

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF AND
APPENDIX**

No. 76-4257

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
YI CHUN CHENG,

Petitioner

-v-

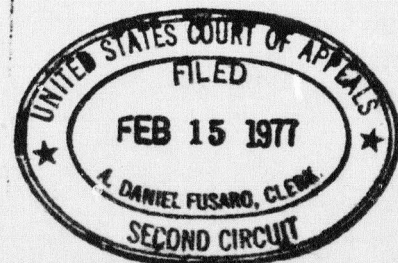
IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.
-----X

Docket No. 76-4257

BRIEF AND APPENDIX FOR PETITIONER
-----X

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QUESTIONS PRESENTED

1. Whether administrative findings and conclusions, supporting a decision that petitioner's motion to reopen deportation proceedings did not make a prima facie of "extreme hardship" within the meaning of 8USC§1254(a)(1), are subject to judicial scrutiny for proper application of the standards prescribed in the relevant statute, regulations and precedent decisions.
2. Whether, pursuant to the unambiguous congressional intent clearly expressed in 8USC§1105(a) that motions to reopen deportation proceedings and to stay deportation pendente lite are reviewable deportation orders, findings and conclusions supporting their denial, may be reviewed by the statutory test, in 8USC§1105(a)(4), of support by reasonable, substantial and probative evidence on the record considered as a whole.
3. Whether, by relying on its findings that petitioner's hardship was personal and not unusual, the Board's

decision that petitioner did not make a prima facie showing of extreme hardship was infected by its application of erroneous legal standards that are contrary to congressional policies clearly enunciated in the 1962 ameliorative amendments to 8USC§1254(a)(1).

4. Whether, notwithstanding the discretionary nature of the Board's refusal to stay petitioner's deportation pending its decision on a motion to reopen, this Court may review such refusal as to the question of the Board applying the proper legal standards in making its decision.
5. Whether, in finding that petitioner's circumstances did not warrant a second grant of voluntary departure under 8CFR 244.1, the Board failed to apply its own standards set forth in its controlling precedent decision.

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Relevant Statutes

Section 106(a) of the I & N Act, 8 U.S.C. §1105(a)

The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5U.S.C. 1031 et seq.) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that-

Section 106(a)(4) of the I & N Act, 8 U.S.C. §1105(a)(4)

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole shall be conclusive;

Section 244(a)(1) of the I & N Act, 8 U.S.C. §1254(a)(1)

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and-

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

Section 244(a)(2) of the I & N Act, 8 U.S.C. §1254(a)(2)

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IMMIGRATION AND NATURALIZATION	:	
SERVICE,	:	
	:	
Respondent.	:	
-----X	:	

PETITIONER'S BRIEF

Statement of the Case

Pursuant to 8USC§1105(a) et seq. YI CHUN CHENG petitions this Court to review a final order of the Board of Immigration Appeals, hereinafter referred to as "the Board". In refusing to reopen petitioner's deportation hearing and to stay his deportation, pendente lite, the Board held that petitioner failed to make a prima facie showing that, within the meaning of 8USC§1254(a)(1), his deportation to Hong Kong would result in extreme hardship to him or specified relatives; and held that petitioner did not deserve a de novo grant of voluntary departure in lieu of deportation.

Petitioner submits that since the Board's order actually involved serious questions of fact and substantial issues of law, it should be judicially scrutinized for determination

not limited to the question of whether there was an abuse of the discretion which naturally pervades decisions on motions to reopen and to stay deportation.

The Facts
and
The Prior Proceedings

Petitioner is a 27-year-old native of mainland China who bravely escaped from communist domination there, leaving all his relatives and proceeded to Hong Kong. He was a mere 16-year-old at that time and he remained in Hong Kong, in an unsettled state, for approximately three years when he made arrangements to settle in Venezuela where several mainland Chinese have settled after escape to, and failure to resettle in, Hong Kong.

On February 1, 1969 while in-transit to Venezuela, by way of the United States, petitioner remained here beyond his authorized stay and on July 11, 1969 he was found deportable under 8USC§1251(a)(2) as a non-immigrant in violation of his status. In lieu of actual deportation he was permitted, until August 1, 1969 or until any extensions granted by the District Director, to depart voluntarily. The Judge's order further directed that failure to comply with contingent voluntary departure would result in the effecting of the Warrant of Deportation provided for in the alternate order. (A-1)

For several years, eventually totalling seven in number, the District Director extended petitioner's voluntary departure time until June 8, 1976, based upon a then recognized medical hardship of petitioner. (A-2 through A-10) After being told that no further extensions would be granted by the District Director, petitioner, who had become the beneficiary of an approved labor certification that was based upon the need for his services (and as was known to the Service) moved the Immigration Court to reopen his deportation proceedings so that he could apply for suspension of deportation as provided by 8USC§1254(a)(1). Prior to expiration of voluntary departure and pursuant to published regulations under 8CFR242.22 which permit reopening of a deportation hearing to apply for relief not available at the time of original hearing, petitioner through prior counsel submitted Immigration Application Form I-256A in support of his motion to reopen which also contained a request for stay of all proceedings to enforce his departure until a decision could be made on the substantial relief requested under 8USC§1254(a)(1).

Even though form I-256A as well as other factual material alluded to in his motion were already a matter of record in petitioner's Immigration file and even though 8USC§1254(a)(1) allows for relief on the basis of hardship to the alien himself or to specified relatives in the United States, the

Immigration Judge on July 20, 1976 denied petitioner's motion on grounds that "...bare allegations that respondent will suffer extreme hardship if deported are not sufficient to make out a prima facie case..."; and on grounds that petitioner did not have any close relatives in the United States. (A-11)

On September 9, 1976 an appeal from this denial was dismissed by the Board which affirmed per curiam the Judge's finding that petitioner had failed to make a prima facie case. (A-12) The Board relied on an unrelated case (Matter of Sipus Interim Decision 2172, (A-13) in which the alien had failed to make even an allegation of hardship; and relied on another unrelated case (Matter of Lam, I.D. 2136, (A-22) in which that alien, unlike petitioner, had claimed economic detriment, alone, as his hardship.

After the Board's dismissal of the appeal and despite the fact that petitioner remained beyond June 8, 1976 to understandably await the outcome of the substantial relief he timely requested, the District Director issued the Warrant of Deportation which according to the order of the Immigration Judge dated July 11, 1969 (A-1) was to go into effect if petitioner failed to comply with the terms of voluntary departure eventually expiring June 8, 1976.

Petitioner thereafter retained present counsel who moved the Board to reconsider its decision of September 9, 1976 and to stay petitioner's deportation scheduled for November 22,

1976 pendente lite. Inviting the Board's attention to matters already in the record, petitioner emphasized that (1) he had escaped from mainland China at an early age (2) he had never settled in Hong Kong or Taiwan the places to which his deportation was directed (3) he had spent the greater and meaningful part of his life in the United States where he had a chance to become a lawful permanent resident (4) his deportation would mean the loss of the job offer which sustains his labor certification and his eligibility for an immigrant visa and settling in the only home he has ever had and that (5) his prolonged presence in the United States was not accomplished through dilatory tactics but through lawful extensions of voluntary departure which were based upon a recognized medical hardship. In the alternative, petitioner requested a de novo grant of voluntary departure, pending visa issuance, and cited the circumstances of his non-abuse or violation of voluntary departure previously given.

The Board immediately decided that it was unlikely that it would remand petitioner's proceedings to the Immigration Judge for a reopened hearing and refused to stay petitioner's deportation. Petitioner sought judicial review of such refusal. Eventually the Board denied petitioner's motion, rejecting Petitioner's claim that, under the "flexibility" formula set in several Board decisions construing extreme hardship in

8USC§1254(a)(1), the elements of hardship cited do make a prima facie showing of extreme hardship which could be fully expounded in the open forum of a hearing.

Pursuant to Rules 2 and 27(q) of the Federal Rules of Appellate Procedure, petitioner has moved this Court for leave to amend his original petition for review dated November 21, 1976 so as to include and consolidated therein his prayer that the Court review simultaneously the Board's decision of January 19, 1977.

Summary
of
Arguments

In affirming the findings and conclusions of the Immigration Judge that petitioner failed to make a prima facie showing of extreme hardship so as to warrant reopening for a full dress hearing and in finding petitioner undeserving of a de novo grant of voluntary departure, the Board applied standards that were contrary to the clearly enunciated congressional policy expressed in 8USC§1254(a), contrary to the regulations and contrary to several of its own precedent decisions.

This Court should vacate the order of the Board and remand the cause for redetermination pursuant to the standards required by law.

ARGUMENTS

I

THE COURT SHOULD REVIEW THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE BOARD'S ORDER

There being no statute granting the right of reopening, and motions to reopen being a creature of regulations empowering the Immigration Judge and the Board to take this type of action, motions to reopen deportation proceedings have been traditionally reviewed for determination of whether there was an abuse of discretion. Greene v. INS 313 F2d 148 (1963); Fan Wan Keung et al. v. INS, 434 F2d 301 (2d Cir.1970); Schieber v. INS, 461 F2d 1078 (2d.Cir.1972); Ching v. INS, 467 F2d. 645 (3rd.Cir.1972); Fai v. INS, 467 F2d.907(3rd.Cir.1972)

However, in matters involving agency discretion, "discretion" should not insulate decisions and procedures from constitutional or statutory challenge. See: Ballenilla-Gonzalez v. INS 76-4130(2d.Cir.12/10/76); Ness Investors Corp. v. U.S. Dept. of Agriculture, 512 F2d.706 (9Cir.1975); Environmental Protection Defense Fund v. Ruckleshaus 439 F2d.584. In fact this Court and several other Courts have held that where there is "fact and law" to apply in discretionary determinations, factual and legal conclusory underpinnings of such discretionary determinations must pass the substantial-evidence test as well

as other applicable statutory and/or regulatory specifications.
See: Hang v. INS, 360 F2d.715(2dCir. 1966); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.402 (1971); Zamora et al. v. INS, 75-4093, (2d Cir. 4/12/76)

The decision of the Board, even though clothed in the mantle of "discretion", was in its body-structure constituted of findings of fact and conclusions of law and should not be reviewed solely for abuse of discretion. Moreover, since Congress intended that motions to reopen deportation proceedings as well as other specified forms of discretionary relief were reviewable deportation orders within the meaning of 8USC§1105(a) et seq., any factual and legal conclusory underpinnings of decisions on such motions should be reviewed to give the alien his "day in Court", pursuant to the intent of Congress clearly expressed at (1) 1961 U.S. Code Congr. and Adm. News, p. 2972 (A-26) at (2) Kwok v. INS, 392 US206 and at (3) 105 Cong. Rec. 12728 (A-27). (See 8USC§1105(a)(4) (A-28).

Petitioner prays that for the foregoing reasons this Court will not limit review of the Board's order to a determination of whether there was an abuse of discretion in refusing to reopen his deportation proceedings.

II

THE BOARD APPLIED ERRONEOUS
LEGAL STANDARDS IN FINDING
THAT PETITIONER DID NOT MAKE
A PRIMA FACIE SHOWING OF EXTREME
HARDSHIP WITHIN THE MEANING
OF 8USC§1254(a)(1)

Prior to enactment October 24, 1962 of Public Law 87-885, the degree of hardship required by 8USC§1254(a)(1) in the 1952 Act was "exceptional and extremely unusual"; and the Board in several decisions defined this type of hardship. (A-29) Public Law 87-885 ammended 8USC§1254(a)(1) to require a lower degree of "extreme hardship" still retaining a requirement in 8USC §1254(a)(2) that aliens deportable under specified grounds would require "exceptional and extremely unusual hardship". Several Board decisions have indicated what does not constitute "extreme hardship" but none appear to issue affirmative guidelines as to what does constitute extreme hardship within the meaning of the ameliorative amendment of 8USC§1254(a)(1) by P.L.87-885.

However, a definition of sorts has been fashioned by the Board when it stated in Matter of Sangster, 11 I&N Dec. 309:

"...It has been held that "extreme hardship" is not a definable term of fixed and inflexible content or meaning. The elements required to establish "extreme hardship" are dependent upon the facts and circumstances peculiar to each case. Cf. Matter of Hwang, Int.Dec.No.1319, and Matter of Uy, Int.Dec. No.1464)....."Concededly the respondent's deportation from the United States

would result in economic detriment to her. It is the considered opinion of this Board, however, that under the circumstances present in this particular case economic detriment in and of itself does not amount to "extreme hardship"....."There are no substantial equities in this case except those arising from the economic factor and this factor, standing alone, is insufficient to support a finding of "Extreme hardship" within the meaning of the statute....."

The foregoing rationale in Sangster, supra, that economic detriment, along with equities, may constitute extreme hardship, has been carried forward by the Board in Matter of Lam, supra; and has been embraced by the Courts. See: Kasravi v. INS, 400 F2d.675; Pelaez v. INS, 513 F2d.303. See also Gordon & Rosenfeld, "Immigration Law & Procedure". 1976 Supp. P.7-109. However, the Board did not apply this "economic detriment-plus-equities" standard in its initial per curiam decision (A-12) when it cited Matter of Lam a case in which economic detriment alone was the element of hardship set forth, in order to dispose of the multiple elements of hardship presented by petitioner.

A key element in petitioner's claim of hardship was his non-speculative assertion that his deportation would mean the loss of the job offer which sustains his labor certification and that his inability to enter as a non-preference or preference immigrant would unconscionably uproot him from the only home he has known since he bravely escaped communist domination at a time when conditions in China were extremely oppressive

and when he was a mere 16-year-old. The Board in effect applied the pre-1962 standard of "exceptional and unusual" now applicable only to 8USC§1254(a)(2) when it disposed of this claim of petitioner in the following manner:

"Any alien's enforced departure from the United States entails hardship. In the cases where all the hardship is ascribable solely to the adjustment necessary in any change of residence, a finding of extreme hardship is generally found unwarranted. That the respondent might lose the job offer does not preclude the respondent from ever entering the United States or from making a living abroad. If he lost the job offer, he would be in the same position as any other prospective nonpreference immigrant at the initial stage."

Contrary to the immediately foregoing findings and conclusions of the Board, petitioner's hardship could hardly be described "all the hardship is ascribable solely to the adjustment necessary in any change of residence...". Similarly petitioner's circumstances could not be accurately described in the following manner:....."If he lost the job offer, he would be in the same position as any other prospective nonpreference immigrant at the initial stage...."(Emphasis supplied) It can only be inferred that an impermissible factor, of the Board's overlooking petitioner's quasi-refugee status, had affected the conclusions arrived at.

It would also appear that the Immigration Judge (A-11) and the Board (A-30) were influenced by petitioner's lack of relatives in the U.S. when making the determination that peti-

tioner did not make a prima facie showing of extreme hardship.

The decision of the Immigration Judge states:

"...Respondent's affidavit indicates as possible hardship that he has no immediate family in Hong Kong. The I-256 indicates they are all in Mainland China. Therefore he has no immediate family in the United States as well."

Similarly the Board stated:

"...The respondent has not made a prima facie showing of eligibility for suspension of deportation. Although the respondent has accumulated seven years of physical presence in the United States, he has failed to show that his deportation would result in extreme hardship to himself or to the relatives designated in section 244(a) of the Act." (Emphasis supplied)

While the earliest suspension of deportation statute (Sec. 20 of the Immigration and Nationality Act of June 23, 1940) required a finding of hardship to specified immediate relatives who are U.S. Citizens or lawful permanent residents, the 1952 Act as well as the subsequent amendments have contained the provision that qualifying hardship may be with respect to the alien himself, even if he has no relatives here.

Petitioner submits that the cumulative effect of the less-than-faithful application of the several statutory, regulatory and precedential standards to the findings of prima facie showing of extreme hardship, is to render the findings and conclusions inherently suspect and to warrant a remand for redetermination according to the appropriate standards. Wang

v. INS, 413 F2d. 286; Luzo-Bedoya v. INS, 410 F2d. 343;
Asimakopoulos v. INS, 455 F2d. 1362.

III

THE BOARD DID NOT
APPLY PROPER CRITERIA
WHEN REFUSING TO STAY
PETITIONER'S DEPORTATION

In deciding that it would not stay petitioner's deportation the Board used as its criterion the unlikelihood that it would grant petitioner's motion to reopen and reconsider. It has been the practice of the Board to stay execution of a deportation order if issues raised were substantial enough to warrant extensive consideration. Such usual practice of the Board puts into effect one of the congressional purposes behind enactment of 8USC§1105(a) which, in addition to eliminating frivolous and repetitious judicial review, was to give aliens an opportunity for in-depth consideration of meritorious claims raised to avoid deportation.

If petitioner's motion to reopen was so totally lacking in merit as to not warrant a stay of deportation, such lack of merit would have been reflected in an expedited, summary and per curiam denial. Petitioner submits that there is no showing that the Board was justified in not applying the criteria of "substantiality of the issues raised" to its decision whether

to grant petitioner a stay of deportation.

IV

THE BOARD'S FINDING
THAT PETITIONER DID NOT
WARRANT A DE NOVO GRANT OF
VOLUNTARY DEPARTURE WAS CONTRARY
TO THE STANDARDS SET IN THE BOARD'S
PRECEDENT DECISION ON THIS ISSUE

In setting the standards for a second grant of voluntary departure pursuant to 8CFR 244.1, the Board held as follows in Matter of Yeung, 13 I & N Dec. 528:

"...A reasonable rule to apply in crewman cases would be that ordinarily voluntary departure should not be granted anew in the absence of strong extenuating circumstances, such as the presence of close family relationships in this country, or where it appears that the failure to depart was due to circumstances beyond the respondent's control.....In exercising discretion, the special inquiry officers and this Board are entitled to take into account the enforcement needs of the Service in the light of changing circumstances.

Each case must, of course, be determined on its own facts and in exercising his discretion the special inquiry officer must appraise the factors which led to the delay. Litigation, whether administrative or judicial, usually results in some delay. Yet, as the special inquiry officer in this case pointed out, not all litigation is by that token frivolously dilatory.

The special inquiry officer has concluded that the respondent could reasonably have construed the Service letters concerning the private bills as extensions of voluntary departure time, and that respondent's failure to depart under these circumstances cannot be considered a deliberate defiance of constituted authority....." (Emphasis supplied)

Petitioner's circumstances clearly illustrate, as he claimed, that his failure to depart by June 8, 1976 was not reflective of a deliberate defiance of constitutional authority and was for the reasons of his understandably awaiting the outcome of his application which he timely filed for substantial relief under 8USC§1254(a)(1).

The Board's evaluation of petitioner's claims is found in its findings and conclusions at p.3 of its decision dated January 19, 1976:

"We are not persuaded that a remand is appropriate to consider a new grant of voluntary departure to the respondent. The respondent was granted voluntary departure initially by an immigration judge on July 11, 1969. The respondent has been granted repeated extensions by the District Director up to June 8, 1976. The record does not reflect such strong extenuating circumstances as would justify a new grant of voluntary departure by an immigration judge. Accordingly, the respondent's motion will be denied."

Under the Board's own standards set forth in Yeung, supra, "strong extenuating circumstances" warranting a second grant of voluntary departure may include situations in which failure to depart was due to circumstances beyond the alien's control. Instead of making findings relative to petitioner's material claim that his remaining beyond June 8, 1976, may come within the applicable criteria, the Board recited the chronology of events involving voluntary departure and immediately proceeded to make the legal conclusory statement that the record does not reflect such strong extenuating circumstances as would

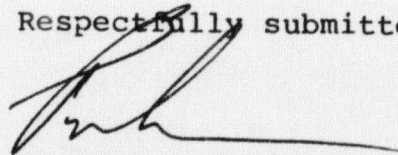
justify a new grant of voluntary departure by an immigration judge.

It is submitted that, inasmuch as petitioner's request for a new grant of voluntary departure was predicated on a material claim that his remaining beyond June 8, 1976 met the criteria in Yeung, the Board should have evaluated such claim and should have adjudicated such request pursuant to its own standards set forth in Yeung.

CONCLUSION

Petitioner prays that, for all of the foregoing reasons, this Court vacate the order of the Board and remand the proceedings for an administrative determination under the standards required by law.

Respectfully submitted,



Dated: February 15, 1977

PAUL RUBIN
Attorney for Petitioner

APPENDIX

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Immigration and Naturalization Service[illegible]

1992

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DATE 08-16-2001 BY SP-6 BTJ/KJS

PLEASE REFER TO THIS FILE NUMBER

1.160012500/30

Please note the below checked action which has been taken in your case.

- You must notify this office, Room No. 451, on or before 10/15/68 10:30 AM of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours,

DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ 1-94 stamped ☐ 1-530 submitted
To _____ Via _____ ☐ 1-161 prepared ☐ 1-156 prepared

Form I-210

GPO 200:740

A-2

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

20 WEST BROADWAY

NEW YORK, N.Y. 10007

MAY 28, 1975

PLEASE REFER TO THIS FILE NUMBER

1516027125 DB/AL

Mr. CHENG Y. CHEN
c/o Dan Amine
159 Chrystie St. Apt 6
New York, N.Y.

Please note the below checked action which has been taken in your case.

- ☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.
- ☐ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.
- ☒ Your application for an extension of time in which to depart from the United States has been GRANTED. You are required to depart on or before AUGUST 20, 1975.

You must notify this office, Room No. 14, on or before AUGUST 15, 1975 of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours,

William F. Kelley
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-161 prepared ☐ I-156 prepared

Form I-210
(Rev 9-1-70) N

GPO 389-746

A-3

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

20 WEST BROADWAY

NY, N.Y. 10007

Aug 11, 1975

PLEASE REFER TO THIS FILE NUMBER

File 027,125

Mr. Cheng Yi Chun
c/o DAM ARINE
157 CHRYSTIE ST. APT #6
NEW YORK, N.Y.

Please note the below checked action which has been taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.

☒ Your application for an extension of time in which to depart from the United States has been GRANTED. You are required to depart on or before NOVEMBER 30, 1975.

You must notify this office, Room No. 14, on or before November 25, 1975 of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours,

Maureen K. Kiley
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-101 prepared ☐ I-156 prepared

A-4

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

30 W Broadway
New York, N.Y.

PLEASE REFER TO THIS FILE NUMBER

A16 007 125 03/5 MC
Nov. 20, 1975

Mr. Cheng Yi Chuen
c/o Sam Ahn
159 Chrystie St. Rt #6
New York, N.Y.

Please note the below checked action which has been taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.

☒ Your application for an extension of time in which to depart from the United States has been Granted. You are required to depart on or before Feb 25, 1976.

You must notify this office, Room No. _____, on or before _____ of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours,

Joe P. Hamerton
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-101 prepared ☐ I-156 prepared

A-5

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

20 West Broadway
NY NY 10007

PLEASE REFER TO THIS FILE NUMBER

A16-027-125

Cheng yi Chen
c/o Dan Amine
159 Christel St. Apt #16
NY NY

DB/SMC.

Please note the below checked action which has been taken in your case.

- ☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.
- ☐ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.
- ☒ Your application for an extension of time in which to depart from the United States has been granted. You are required to depart on or before MARCH 2, 1976 (-FINAL EXTENSION)

You must notify this office, Room No. _____, on or before _____ of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours,

Harold J. Grace
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-161 prepared ☐ I-156 prepared

A-6

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

20 West Broadway DO/smc
NY NY 10007

PLEASE REFER TO THIS FILE NUMBER

A16-027-125

Cheng yi Chun
c/o Sam Amine
159 Christie St. Apt #6
New York NY

Please note the below checked action which has been taken in your case.

☐

You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐

In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.

☒

Your application for an extension of time in which to depart from the United States has been GRANTED. You are required to depart on or before _____.

JUNE 2, 1976

You must notify this office, ^{FL 0112} No. 14, on or before MAY 24, 1976 of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours,

John D. Robertson
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-161 prepared ☐ I-156 prepared

Form I-316
(Rev 9-1-70) N

GPO 300-746

54

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

20 West Broadway
N.Y. N.Y. 10007

DEC/SMC

PLEASE REFER TO THIS FILE NUMBER

A16-027-125

June 1, 1976

Cheng yi Chun
c/o Dan Amine
159 Chrystie Street #6
N.Y. N.Y. 10002

Please note the below checked action which has been taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.

☒ Your application for an extension of time in which to depart from the United States has been Denied. You are required to depart on or before _____.

June 8, 1976
You must notify this office, Room No. South 3, on or before June 7, 1976 of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

Very truly yours

Harold J. Grace
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-161 prepared ☐ I-156 prepared

A-7

May 26, 1976

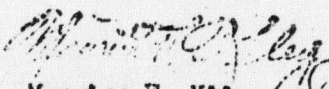
CHENG YI Chun
c/o Dan Amine
159 Chrystie Street Apt. 6
New York, N.Y. 10002

Dear Sir:


Reference is made to your request for an extension of voluntary departure submitted in your behalf by your attorney.

Your request has been denied in that any additional medical treatment necessary for your problem can be obtained in Hong Kong. You are still required to depart the United States on or before the expiration of your voluntary departure date of June 2, 1976.

Sincerely,


Maurice F. Kiley
District Director
New York District

CC: Robert E. Slatius, Esq.
420 East 70 St. Suite 2M
New York, N.Y. 10021


A-518
A-8

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

FILE: 110 027 125 - NEW YORK

6/1/76
9- 6/5/76
DATED: JUL 20 1976 420 E. 70th St
6/7/76

ON BEHALF OF RESPONDENT:

IN THE MATTER OF:
IMMIGRATION PROCEEDINGS

against

YI CHUN CHING

Respondent

Robert E. Slatus, Esq.
420 East 70th Street
Suite 2N
New York, N.Y. 10021

ON BEHALF OF SERVICE:

William Dunlop, Esq.
Trial Attorney
New York, N.Y. 10007

ORDER DENYING MOTION TO REOPEN

The position by the Trial Attorney in opposing reopening of respondent's deportation hearing in order to apply for suspension of deportation is well taken. Bare allegations that respondent will suffer extreme hardship if deported are not sufficient to make out a prima facie case.

Respondent's affidavit indicates as possible hardship that he has no immediate family in Hong Kong. The I-256 indicates they are all in Mainland China. Therefore he has no immediate family in the United States as well.

Respondent's allusion to medical treatment is too nebulous to warrant consideration as extreme hardship. Hopefully for respondent his stay at the hospital and his continued treatment will be limited in time.

For the above reasons respondent's motion to reopen is denied.

ORDER: IT IS ORDERED that the within motion be and the same be denied
as to any and all relief prayed for therein.

James H. [Signature]
ALICE H. [Signature]
Immigration & Naturalization Service

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: 125 - New York

SEP 9 - 1976

In re: UN CHENG

IMMIGRATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert E. Slatius, Esq.
420 East 70th Street
Suite 2N
New York, N.Y. 10021

ON BEHALF OF I&N SERVICE: William Dunlop, Esq.
Trial Attorney

CHARGE:

ORDER: Section 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)) - Nonimmigrant visitor -
remained longer than permitted

APPLICATION: REOPENING

ORDER:

PER CURIAM. The decision of the immigration judge denying the motion to reopen is affirmed. The respondent has failed to make a prima facie showing of eligibility for suspension of deportation. Matter of Sipus, Interim Decision 2172 (BIA 1972); Matter of Lam, Interim Decision 2136 (BIA 1972). Accordingly, the appeal is dismissed. The request for oral argument is also denied 8 C.F.R. 3.1(c).

Chairman

A-12

Interim Decision #2172

MATTER OF SIPUS

In Deportation Proceedings

A-14293683

Decided by Board November 10, 1972

- (1) A mere showing that an alien has achieved the minimum statutory period of continuous physical presence for suspension of deportation does not, without more, justify granting a motion to reopen the deportation proceedings to permit an application for suspension.
- (2) A motion to reopen the proceedings should disclose all prior and pending judicial litigation in the case.

CHARGE:

Order: Act of 1952 - Section 241(a)(2) [8 U.S.C. 1251(a)(2)] - Non-immigrant visitor - remained longer than permitted.

ON BEHALF OF RESPONDENT:

Hiram W. Kwan, Esquire
840 North Broadway
Los Angeles, California 90012
(Brief filed)

ON BEHALF OF SERVICE:

William S. Howell
Trial Attorney

This is an appeal from an order of a special inquiry officer denying the respondent's motion to reopen the deportation proceedings to allow her to file an application for suspension of deportation under section 244 (a)(1) of the Immigration and Nationality Act. Oral argument, which is requested, is no longer available as a matter of right on such an appeal, 8 C.F.R. 3.1(e). Oral argument will be denied and the appeal will be dismissed.

A-13

Respondent is a 51-year-old married female alien, a native and citizen of the Philippines, who was admitted to the United States on July 26, 1965 as a nonimmigrant visitor and remained longer than permitted. At a hearing before a special inquiry officer on January 28, 1969, she admitted the factual allegations of the Order to Show Cause, conceded deportability and applied for voluntary departure. The special inquiry officer found her deportable and granted voluntary departure to March 1, 1969. She failed to depart.

On April 29, 1972, counsel filed a motion to reopen the proceedings so that respondent might file an application for suspension of deportation. Attached to the motion was a filled-out suspension application. The motion to reopen, which is unsupported by any affidavit or other evidence, is extremely brief. Its essence is contained in two short paragraphs:

"[III] Respondent is statutorily eligible for suspension of deportation having first entered the United States in March 1962. It is believed her case falls squarely within 12 I & N Dec. 271.

"[IV] Counsel is prepared to present the necessary evidence at the time of hearing."

The suspension application recites that respondent first entered the United States as a visitor on March 27, 1962 and was absent thereafter but once, from December 1964 to the date of her last entry on July 26, 1965. The Service's trial attorney opposed the motion on the ground that this absence of almost eight months broke the continuity of the seven years' physical presence required by section 244(a)(1) of the Act. The special inquiry officer agreed and denied the motion in his order dated May 23, 1972, now before us on appeal.

The issue raised on appeal is now moot. More than seven years have now elapsed since respondent's last entry on July 26, 1965. We therefore need not consider whether her preceding absence broke the continuity of her physical presence following the 1962 entry. Since she can now establish the minimum required period of physical presence, we would ordinarily reopen and remand if her motion papers made out a prima facie case for reopening in other regards. In our view, they do not.

The motion to reopen, as we have noted, is singularly lacking in factual detail. The suspension application reflects that respondent's husband, whom she married on December 24, 1942, is a self-employed farmer in the Philippines. Respondent's five children, ranging in age from 9 to 27, are natives and citizens of the Philippines and presumably now reside there since their present residence is not indicated. Neither the husband nor any of the children is listed as a permanent resident alien. Respondent also lists six brothers and sisters, all natives and citizens of the Philippines, now also presumably residing there. Since December 1966 respondent has been employed as a domestic and now earns \$125 a week. She states she cannot return to her native land because of "financial hardship."

As we pointed out in Matter of Lam, Interim Decision 2136 (BIA 1972), continuous physical presence for the minimum statutory period is only one of the eligibility requirements for suspension of deportation. There are others, including a showing that the alien's deportation would result in extreme hardship to the alien or other specified family members who are citizens or legally resident aliens. The pertinent regulations 1/

1/ Reopening before the Service is governed by 8 C.F.R. 242.22 and 103.5. Reopening before the Board is governed by 8 C.F.R. 3.2 and 3.8.

require that a motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening. Much depends on the nature of the case and the force of the evidence already appearing in the record sought to be reopened. Where that record is negative or contains adverse factors, a mere statement of conclusory allegations with respect to the statutory prerequisites is seldom enough. Where reopening for suspension purposes is sought, a mere showing that the alien has at last achieved the minimum statutory period of continuous physical presence does not ordinarily, without more, establish the other statutory prerequisites sufficiently to warrant reopening for a plenary hearing. On the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening.

On the record now before us, we cannot infer from the mere fact that respondent can now establish seven years' continuous physical presence that she may also be able to prove the prerequisite extreme hardship if given a chance at a reopened hearing. From what already appears, it is clear that all her close relatives are in the Philippines. Respondent's deportation there, far from causing extreme hardship by separating her from her family, would serve to reunite her with them. Insofar as concerns the "financial hardship" which she asserts in her application, it has been consistently held that mere economic detriment, without more, is not enough to make out the extreme hardship required by the statute, Kazravi v. INS, 400 F.2d 675 (9 Cir. 1968); Kwan Shick Myung v. INS, 338 F.2d 330 (7 Cir. 1966).

If there are other facts in counsel's possession which would tend to make out a case of extreme hardship, he has not made them known. The special inquiry officer cannot be expected to act on conjecture. Counsel's unsupported and conclusory assertion in the motion that he "is prepared to present the necessary evidence at the time of hearing" does not tell us or the special inquiry officer what evidence he is prepared to present and does not satisfy us that the additional delay entailed in a reopening would likely be worthwhile. We conclude that the special inquiry officer properly denied the motion to reopen.

One further aspect of this case should be mentioned. From the record now before us, it appears that on May 11, 1972, after he had filed the motion to reopen but before the special inquiry officer had ruled on it, counsel for respondent filed a petition under section 106(a) of the Immigration and Nationality Act to review the original deportation order, Sipus v. INS, 9 Cir. No. 72-1833. On June 16, 1972, the court entered an order dismissing the petition for review and dissolving the statutory stay of deportation automatically available under section 106(a)(3) of the Act. On June 21, 1972, counsel petitioned the court for rehearing. In his supporting memorandum, counsel challenged the special inquiry officer's order now before us on appeal and argued, on the "extreme hardship" issue, that "[Respondent], at the age of 51 and with no recent employment history in her native country, would experience extreme difficulty in finding work of any kind if she were deported to the Philippines." On June 28, 1972 the court denied the petition for rehearing.

We mention the court proceedings for two reasons: First, in court counsel went into considerably more detail in defining the extreme hardship claim than he did either before the special inquiry officer or before this Board on appeal. Even with these additional details, we are satisfied that a prima facie case for reopening is not made out.

Second, we note that neither in his notice of appeal dated June 3, 1972, nor in his brief on appeal to this Board bearing the same date, did counsel mention the proceedings for judicial review then pending. We have previously pointed out how important it is that we be informed of court litigation brought by a party to a proceeding before us which might affect our decision in that proceeding. See Matter of Wong, Interim Decision 1971 (BIA 1969); 8 C.F.R. 3.8(a). Prior litigation is important because, among other things, the judgment entered therein may have res judicata effect. It is equally necessary that we be informed of pending litigation, so that we may either withhold or shape our decision in such a way as not to impinge upon the jurisdiction of the court. If counsel deliberately withheld this information from us, we could only regard it as a lack of the good faith which we are entitled to expect from attorneys who appear before us.

We have no reason to believe that either of the Ninth Circuit's judgments has conclusive effect on the issue now before us. The petition for review dismissed by the court's order of June 16, 1972 dealt with the original deportation order and not the special inquiry officer's order now before us. While counsel sought to draw the latter order into the court proceedings in his petition for rehearing, it is clear that he did not succeed. In denying the petition for rehearing, the court wrote no opinion. It is fairly inferable, however, that the court's refusal to entertain respondent's challenge to the special inquiry officer's order was due to respondent's failure to exhaust her administrative remedy of appeal to this Board, as required by section 106(c) of the Act. We see no reason to regard the court's order of June 28, 1972 as an adjudication on the merits of the issue now before us. Accordingly, we shall enter an order disposing of the appeal before us on its merits.

ORDER: The appeal is dismissed.

Warren R. Torrington, Member, Concurring:

I concur in the result, but not in the unnecessary, inaccurate, and misleading statements which appear in the following paragraph quoted from the Board opinion.

"No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening. Much depends on the nature of the case and the force of the evidence already appearing in the record sought to be reopened. Where that record is negative or contains adverse factors, a mere statement of conclusory allegations with respect to the statutory prerequisites is seldom enough. Where reopening for suspension purposes is sought, a mere showing that the alien has at last achieved the minimum statutory period of continuous physical presence does not ordinarily, without more, establish the other statutory prerequisites sufficiently to warrant reopening for a plenary hearing. On the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening."

They might create the--wrong--impression that we have the right to ignore the regulations which govern motions to reopen, and which are cited in footnote 1 of the Board opinion. We have no such right. The regulations have the force of law; and it is our duty to enforce them. Thus, "a mere statement of conclusory allegations with respect to the statutory prerequisites" for the relief sought is not "seldom enough;" it is never enough. The quoted dictum is in sharp conflict with the letter and

spirit of the clear provisions of the pertinent regulations. Section 3.8 of Title 8 of the Code of Federal Regulations expressly provides in subsection (a) as follows: "..... Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material....." [Emphasis supplied.] Almost identical provisions govern motions to reopen directed to an officer of the Service and, in particular, in deportation proceedings to a special inquiry officer. 8 C.F.R. 103.5 and 8 C.F.R. 242.22.

Similarly, where "reopening for suspension purposes is sought, a mere showing that the alien has at last achieved the minimum statutory period of continuous physical presence does not" ever, "without more, establish the other statutory prerequisites sufficiently to warrant reopening for a plenary hearing." The use of the word "ordinarily" in the Board opinion appears to me to be quite misleading.

Finally, the following statement quoted from the Board opinion is far too broad and general, and is therefore not a correct exposition of what we can lawfully do: "On the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening."

Obviously, a motion to reopen will always be granted where a failure to reopen the proceedings might result in a gross miscarriage of justice. For example, in a matter involving an alien's application for withholding of deportation to a country in which he allegedly would be subject to persecution on account of race, religion, or political opinion, neither a special inquiry officer nor this Board would dream of denying a motion to reopen because of some "technical inadequacy" (as the Board opinion puts it). That, however, does not mean that we have the general authority to "overlook" clear violations of, or non-compliance with, the applicable laws and regulations of the United States.

MATTER OF LAM

In Deportation Proceedings

A-15639821

Decided by Board March 23, 1972

Apart from an alien's failure to establish prima facie the extreme hardship required to qualify for suspension of deportation, where, as in the instant case, he managed to stave off deportation and accrue the minimum statutory period of physical presence only by resort to dilatory procedures (including a petition for review denied for lack of prosecution), in the absence of compelling circumstances to counterbalance such an adverse factor denial of his motion to reopen to apply for suspension of deportation is warranted purely as a matter of discretion.

CHARGES:

Order: Act of 1952 - Section 241(a)(2) [8 U.S.C. 1251(a)(2)] -
Entered without inspection.

Lodged: Act of 1952 - Section 241(a)(1) [8 U.S.C. 1251(a)(1)] -
Excludable at time of entry - nonimmigrant, not in possession of valid nonimmigrant visa or border crossing identification card and not exempted from the possession thereof, as described in section 212(a)(26) [8 U.S.C. 1182(a)(26)].

ON BEHALF OF RESPONDENT:

Samuel D. Myers, Esquire
134 North La Salle Street, Suite 1616
Chicago, Illinois 60602

ON BEHALF OF SERVICE:

Olga M. Springer
Trial Attorney
(Brief filed)

In a decision dated April 10, 1968, a special inquiry officer found the respondent deportable on the charge in the Order to Show Cause and on the lodged

~~A-15639821~~
A-20

charge, granted him voluntary departure and ordered deportation if he should fail to depart. The Board dismissed his appeal on June 5, 1968. Respondent's motion to reopen to apply for adjustment of status under section 245 of the Immigration and Nationality Act was denied by the Board on July 23, 1968. A petition for review was filed in the United States Court of Appeals for the Seventh Circuit and was dismissed on January 30, 1969 for want of prosecution. On August 26, 1970, the Board denied the respondent's motion to reopen the deportation proceeding so that an application for suspension might be filed under section 244 (a)(1) of the Act.

Another petition for review was filed in the United States Court of Appeals for the Seventh Circuit, largely challenging the merits of the April 10, 1968 determination of deportability. In dismissing the petition for review on October 7, 1971, the court held that review of the merits of the April 10, 1968 order is barred by the lapse of time; and that the Board's action on August 26, 1970 denying the motion to reopen was discretionary. The court found no abuse of discretion. This matter is now before us again on motion to reopen to permit the respondent to apply for suspension of deportation. The present motion will be denied.

To be eligible for suspension of deportation under section 244(a)(1) of the Act, the respondent must establish: (1) physical presence in the United States for a continuous period of not less than seven years preceding the date of application; (2) good moral character during all such period; and (3) extreme hardship to the alien or other specified family members which would result from the alien's deportation. The regulations require that a motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

A-21

In support of the claim of hardship made in this motion, respondent submitted an affidavit which states a number of conclusions, none of which is supported by evidence or states the facts upon which it is based. The affidavit states that he would be unable to support himself in Hong Kong; that he would be unable to obtain a job; that he might starve to death; that he fears the communists in Hong Kong; and that he would become physically and emotionally ill if he had to leave the United States. All statements are conclusions, purely conjectural and not supported by any facts or evidence. In substance, what respondent alleges is tantamount to economic hardship if he is returned to Hong Kong. Economic detriment without more, however, is not enough to establish the hardship contemplated to qualify for the relief of suspension of deportation, Kasravi v. INS, 400 F.2d 675 (9 Cir. 1968); Kwang Shick Myung v. INS, 368 F.2d 330 (7 Cir. 1966).

Respondent contends that a denial of this motion would be a denial of due process, a prejudgment without a complete hearing depriving the respondent of a chance to be heard, and would make the respondent suffer from the possible omissions of prior counsel. These contentions ignore the sequence of events which have transpired since April 10, 1968, when he was found deportable and granted the privilege of voluntary departure. The evidence in the record establishes that the respondent has not been denied due process, that he has had ample opportunity to present his case before administrative and judicial tribunals, and that he has in fact taken advantage of these opportunities. The motion and affidavit presented do not state new facts which would establish, prima facie, the extreme hardship required to make respondent eligible for suspension of deportation under section 244(a)(1) of the Act. Respondent has not met the clear requirements for reopening set forth in the regulations. Reopening is not to be had

for the mere asking. Due process does not require re-opening for a plenary hearing when a prima facie case of eligibility for the relief sought has not been established.

Moreover, quite apart from respondent's failure to make out a prima facie case, there is another compelling reason to deny the motion as a matter of discretion. Respondent entered without inspection on February 1, 1963. He has managed to eke out the minimum period of seven years' physical presence only by resorting to dilatory procedures. One flagrant example among many will suffice: On September 4, 1968, long before the seven-year period had accrued, he filed a petition for review under section 106(a) of the Act, challenging the deportation order then outstanding, Cheuk Jor Lam v. INS, 7 Cir., No. 17142. Pursuant to section 106(a)(3) of the Act, deportation was automatically stayed. He failed to prosecute the action, and on January 30, 1969 the court dismissed it for lack of prosecution.

Where, as here, an alien manages to stave off deportation and accrue the minimum statutory period of physical presence only by resort to such obviously dilatory tactics, in the absence of other compelling circumstances sufficient to counterbalance such an adverse factor we are warranted in denying a motion to reopen purely as a matter of discretion.

ORDER: It is ordered that the motion be and the same is hereby denied.

A-23

LEGISLATIVE HISTORY

dies, or if he has departed from the United States. A subsequent petition for review or for habeas corpus will not be entertained if the validity of the order of deportation has been previously determined in any judicial proceeding, unless the new petition presents grounds which the court finds could not have been presented previously, or the court finds that the remedy in the previous proceeding was inadequate or ineffective to test the validity of the order.

Proceedings for court review pending on the effective date of this legislation are transferred to the appropriate court for trial in accordance with the provisions of this section.

Pending judicial actions to review exclusion proceedings are directed to be expedited in the same manner as is required in habeas corpus. The section contains a 30-day deferred effective date, and the customary separability clause. Implicit in this section, carried forward from the 1950 act, is the authority of Federal courts of appeals to promulgate appropriate rules for the conduct of, and practice in, the review of deportation orders.

(c) **Review of deportation orders.**—Section 5 of the instant bill contains a number of features which fully establish the propriety and form of judicial review made available to aliens involved in deportation proceedings. The forum is the U. S. court of appeals, where judicial review has been provided for many years respecting orders of other administrative agencies. Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges. To make certain that the institution of the proceeding in the court of appeals shall not harm the alien or be restrictive upon his desire for court review, the bill, as amended, declares that the review may be had upon the basis of a typewritten record and typewritten briefs. This obviously will save the alien financial cost. This is consistent with and supplementary to the benefits now available to aliens as well as citizens under the recent amendment to the Judicial Code of September 21, 1959, Public Law 86-320, 73 Stat. 590, 28 U.S.C. 1915, permitting the filing of court actions without payment of fees and costs if the person involved establishes to the court's satisfaction that he is unable to pay the same.

The venue is designated in this section not only for the benefit of the United States but also for the good of the alien. The bill declares that he shall bring his action in the court of appeals in the vicinity either where the administrative proceeding was conducted, or where he has his residence. Obviously, this will reduce the workload upon the crowded courts, especially in those places where aliens have heretofore shopped for judicial redress of their fancied wrongs. At the same time, the alien is guaranteed the right to bring an action in a court most convenient to him. The committee is aware, of course, that the number of circuit courts is numerically less than the number of district courts. This is not a disadvantage to the alien when consideration is given to the fact that many circuit courts, particularly in the less populous areas, travel a circuit and hold court in more than one place. By directing the court action to be brought in the vicinity where the alien resides or where the administrative proceeding was instituted, the committee does not lessen the alien's ability to obtain justice. On the con-

distinct from those conducted under § 242(b), by an officer other than the special inquiry officer who, as required by § 242(b), presided over the deportation proceeding. The order here did not involve the denial of a motion to reopen proceedings conducted under § 242(b), or to reconsider any final order of deportation. Concededly, the application for a stay assumed the prior existence of an order of deportation, but petitioner did not "attack the deportation order itself but instead [sought] relief not inconsistent with it." *Mui v. Esperdy*, 371 F.2d 772, 777 (C.A.2d cir.). If, as the Immigration Service urges, § 106(a) embraces all determinations "directly affecting the execution of" a final deportation order, Congress has selected language remarkably inapposite for its purpose. As Judge Friendly observed in a similar case, if "Congress had

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wanted to go that far, presumably it would have known how to say so." *Ibid*.

[5] The legislative history of § 106(a) does not strengthen the position of the Immigration Service. The "basic purpose" of the procedural portions of the 1961 legislation was, as we stated in *Foti*, evidently "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts * * *." 375 U.S., at 226, 84 S.Ct. at 312. Congress prescribed for this purpose several procedural innovations, among them the device of direct petitions for review to the courts of appeals. Although, as the Immigration Service has emphasized, the broad purposes of the legislation might have been expected to encompass orders denying discretionary relief entered outside § 242(b) proceedings, there is evidence that Congress deliberately restricted the application of § 106(a) to orders made in

the course of proceedings conducted under § 242(b).

Thus, during a colloquy on the floor of the House of Representatives, to which we referred in *Foti*,¹³ Representative Moore, co-sponsor of the bill then under discussion, suggested that any difficulties resulting from the separate consideration of deportability and of discretionary relief could be overcome by "a change in the present administrative practice of considering the issues * * * piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief." 105 Cong.Rec. 12728. In the same colloquy, Representative Walter, the chairman of the subcommittee that conducted the pertinent hearings, recognized that certain forms of discretionary relief may be requested in the course of a

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deportation proceeding, and stated that § 106(a) would apply to the disposition of such requests, "just as it would apply to any other issue brought up in deportation proceedings." 105 Cong.Rec. 12728 (emphasis added). Similarly, Representative Walter, in a subsequent debate, responded to a charge that judicial review under § 106(a) would prove inadequate because of the absence of a suitable record, by inviting "the gentleman's attention to the law in section 242, in which the procedure for the examiner is set forth in detail." 107 Cong.Rec. 12179.

We believe that, in combination with the terms of § 106(a) itself, these statements lead to the inference that Congress quite deliberately restricted the application of § 106(a) to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders

granted voluntary departure, was issued on March 3, 1966. Petitioner filed his application for a stay on June 20, 1966. The application was evidently denied on the same day.

13. See 375 U.S., at 223-224, 84 S.Ct. at 310-311.

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Cross reference.—Compensation of administrator of Bureau of Security and Consular Affairs, see § 5315 (1), of Title 5.

1105. Liaison with internal security officers.—The Commissioner and the administrator shall have authority to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Act in the interest of the internal security of the United States. The Commissioner and the administrator shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform, and efficient administration of this Act, and all other immigration and nationality laws. (June 27, 1952, c. 477, Title I, § 105, 66 Stat. 175.)

Reference in text.—“This Act,” referred to in this section, appears as §§ 1101 and notes-1106, 1151-1156, 1181, 1182, 1183, 1184, 1185, 1201, 1202-1204, 1221-1230, 1251, 1252-1255, 1256-1260, 1281-1287, 1301-1306, 1321-1330, 1351-1353a, 1353d, 1354-1363, 1401, 1402-1409, 1421-1440, 1441-1455, 1457-1459, 1481-1489, and 1501-1503 of this title; §§ 1114, 1429, and 1546 of Title 18; §§ 618 and 1446 of Title 22; and § 1 (7) of Title 49.

Cross reference.—Central Intelligence Agency, see §§ 403-403j of Title 50.

1105a. Judicial review of orders of deportation and exclusion.—(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act [§ 1252 (b) of this title] or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later;

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act [§ 1101 of this title], of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United

States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code [28 § 2201]. Any such petitioner shall not be entitled to have such issue determined under section 360 (a) of this Act [§ 1503 (a) of this title]; or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act [§ 1252 (d), (e) of this title] only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code [28 § 2201]. Any such alien shall not be entitled to have such issue determined under section 360 (a) of this Act [§ 1503 (a) of this title] or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order

the circumstances and equities in each case.⁶² And it must be borne in mind that each of the relatives mentioned in the statute is a defined term. The definition and scope of the terms "spouse,"⁶³ "child,"⁶⁴ and "parent"⁶⁵ are considered elsewhere.

The term "exceptional and extremely unusual hardship" merits careful scrutiny. The Senate Judiciary Committee explained that this language was used in the 1952 Act for the purpose of restricting the opportunity for suspension. The Committee commented that all deportations involve hardship and that it wished to limit the suspension remedy to situations in which deportation "would be unconscionable."⁶⁶ These observations have been severely criticized.⁶⁷

The Board of Immigration Appeals has announced the following general criteria to be weighed in assessing whether exceptional and extremely unusual hardship is present:

1. Length of residence in United States (including consideration of manner and purpose of entry).
2. Family ties in United States.
3. Possibility of obtaining a visa abroad.
4. Financial burden on alien of having to go abroad to obtain a visa.
5. The health and age of the alien.

⁶² Matter of Uy, 11 IN (I.D. 1464, 1965) (came as student, family ties all in Philippines, residence of 8 years here, no extreme hardship even though economic opportunities less in Philippines); Matter of Sangster, 11 IN (I.D. 1506, 1965) (same, Jamaica). See also n. 60, supra.

⁶³ See §2.18a.

⁶⁴ See §2.18b.

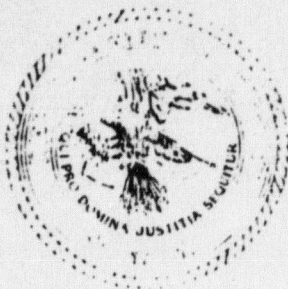
⁶⁵ See §2.18c.

⁶⁶ S. Rep. 1137, 82d Cong., 2d Sess., p. 25. The observations of the House Committee were similar, but more moderate. H. Rep. 1365, 82d Cong., 2d Sess., pp. 62-63.

⁶⁷ Pres. Comm. Rep., pp. 211-215; Maslow, "Recasting our Deportation Law," 56 Colum. L.R. 309, 342 (1956).

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The existence of several, but not necessarily all, of these factors ordinarily will be required.⁶⁸



United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

SEP 15 1977

File: A16 027 125, - New York

In re: YI CHUN CHENG

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul Rubin, Esquire
Three West 57th Street
New York, New York 10019

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)) - Nonimmigrant visitor -
remained longer than permitted

APPLICATION: Reconsideration

This is a motion to reconsider our decision of September 9, 1976 dismissing an appeal from a decision of an immigration judge dated July 20, 1976 denying a motion to reopen the deportation proceedings against the respondent. The respondent's motion will be denied.

The respondent is a 27-year-old native of China who entered the United States on February 1, 1969 at New York, New York in transit without visa. At a hearing held on July 11, 1969, the respondent was found deportable as an overstayed nonimmigrant and was granted the privilege of voluntary departure by the immigration judge to be effected not later than August 1, 1969. The respondent did not leave by the date initially au-

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thorized by the immigration judge. The record further shows that the respondent has been granted repeated extensions to depart voluntarily by the District Director, the last one expiring on June 8, 1976.

The respondent's original motion to the immigration judge for reopening was filed so as to allow him to file for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act and obtain a new grant of voluntary departure from the immigration judge. The motion to reconsider now before us is directed to obtain a reopening of the proceedings for the same purposes.

The respondent has not made a prima facie showing of eligibility for suspension of deportation. Although the respondent has accumulated seven years of physical presence in the United States, he has failed to show that his deportation would result in extreme hardship to himself or to the relatives designated in section 244(a) of the Act.

No affidavits or other documentary evidence has been submitted detailing the facts upon which the claim of extreme hardship is based. Conclusionary statements without evidentiary or factual support are not sufficient to obtain reopening. See Matter of Lam, 14 I&N Dec. 98 (BIA 1972). However, even if we were to accept the statements of counsel in his brief as equivalent of the factual or evidentiary support which must accompany motions of this nature, we are not satisfied that a prima facie case has been made for reopening the proceedings.

Counsel avers that the respondent's medical problems warrant a finding of extreme hardship. However, the evidence in the record seems to indicate that the respondent's medical condition is not to impair his general ability to function normally.

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That the respondent's deportation would mean the loss of the job offer that sustains his approved labor certification which would mean his inability to enter as a nonpreference immigrant or as a sixth preference immigrant, if a visa petition is approved, cannot be considered extreme hardship, even if we discount the speculative nature of this assertion.

Any alien's enforced departure from the United States entails hardship. In the cases where all the hardship is ascribable solely to the adjustment necessary in any change of residence, a finding of extreme hardship is generally found unwarranted. That the respondent might lose the job offer does not preclude the respondent from ever entering the United States or from making a living abroad. If he lost the job offer, he would be in the same position as any other prospective nonpreference immigrant at the initial stage.

We reject counsel's contention that we should recede from our interpretation of 8 C.F.R. 244.1 as enunciated in Matter of Yeung, 13 I&N Dec. 528 (BIA 1970).

We are not persuaded that a remand is appropriate to consider a new grant of voluntary departure to the respondent. The respondent was granted voluntary departure initially by an immigration judge on July 11, 1969. The respondent has been granted repeated extensions by the District Director up to June 8, 1976. The record does not reflect such strong extenuating circumstances as would justify a new grant of voluntary departure by an immigration judge. Accordingly, the respondent's motion will be denied.

ORDER: The motion is denied.

Chairman

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